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OCTOBER TERM, 1998

VAUGHN L. MURPHY, PETITIONER,

v.

UNITED PARCEL SERVICE, INC., RESPONDENT.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICUS CURIAE* FOR THE AMERICAN
TRUCKING ASSOCIATIONS AND THE NATIONAL
ASSOCIATION OF MANUFACTURERS, ET AL.,
IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

The *amici curiae* will address the following questions:

1. Whether assessment under the Americans with Disabilities Act of a plaintiff's limitations must include consideration of corrective measures that ameliorate the effects of an impairment on major life activities.
2. Whether, when an employer terminates an employee because that employee fails to satisfy an objective job requirement as the result of a medical condition, that employer necessarily regards the employee as disabled.

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BRIEF AMICUS CURIAE OF THE AMERICAN TRUCKING ASSOCIATIONS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS, ET AL., IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*¹

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA membership includes more than 3,700 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all manufacturing workers and produce over 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The American Moving & Storage Association ("AMSA") is the national trade association of the moving and storage

¹ The written consents of the parties to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

industry. It has approximately 3,500 members worldwide and represents the entire spectrum of the United States domestic moving and storage industry. AMSA's membership includes 25 national van lines, 1,100 independent regulated carriers, 1,600 agents of van lines (1,000 of whom are also regulated carriers), and over 500 international movers.

The Towing & Recovery Association of America ("TRA") is a national association of more than 1,400 towing and recovery operators serving North America. TRAA is charged with promoting professionalism, quality customer service, and safety in towing operations throughout the country.

The Specialized Carriers & Rigging Association ("SC&RA") is a national association of motor carriers that transport commodities whose unusual size or weight requires special transportation equipment. SC&RA's over 1,000 members include steel haulers, oil field equipment transporters, crane and rigging companies, millwright contractors, and transporters of construction and military equipment.

The Truckload Carriers Association ("TCA") is a national trade association representing the motor carrier industry's irregular-route truckload segment (such as dry van, refrigerated, flatbed, and dump trailers). TCA's more than 600 motor carrier members are domiciled throughout the continental United States, and serve the United States, Mexico, and Canada.

The National Tank Truck Carriers, Inc. ("NTTC") is a national trade association of 200 corporate members specializing in transporting hazardous materials, substances, and wastes in cargo tank trucks. Its members operate throughout the United States, Mexico, and Canada.

The Association of Waste Hazardous Materials Transporters ("AWHMT") is a national association of motor carriers that transport hazardous waste materials, such as industrial and radioactive wastes. Through its approximately 80 members, the AWHMT promotes professionalism and performance standards that minimize risks to the environment, public health, and safety.

The National Automobile Transporters Association ("NATA") represents motor carriers that transport over 95% of all new motor vehicles through either driveaway or truckaway operations. NATA represents the joint interest of its nineteen carrier members, and seeks continuously to improve their quality of service, safety, and productivity.

The issues at stake in this case are of direct concern to *amici* and their members. *Amici* strongly support, and are deeply committed to, equality of employment opportunity for all persons and believe that unlawful discrimination in all forms should be eliminated from the workplace. At the same time, members of *amici*, as employers of millions of workers, have a large stake in ensuring that the provisions of the Americans with Disabilities Act are correctly and fairly applied.

If this Court reverses the Tenth Circuit's decision and excludes mitigating measures from the disability determination, individuals whose medicated or otherwise corrected conditions do not significantly restrict their functional abilities could qualify as "disabled" persons entitled to the ADA's full panoply of protections. Such an expansion of the term "disability" would ignore the statutory requirement that an impairment "substantially limit" one or more of a person's major life activities. At odds with congressional intent, it would automatically turn a huge segment of the American population into "disabled" persons covered by the Act, undermining the ADA's goal to eliminate discrimination

against the truly disabled. *Amici* have strong interests in establishing a fair and workable standard of disability that, by taking into account internal and external mitigating factors, encompasses only those persons who are truly limited in a major life activity.

STATEMENT

Petitioner Vaughn Murphy has lived with high blood pressure for most of his life. Pet. App. 2a, 13a. He experiences virtually no limitations from his hypertension because he controls the condition with medication. *Id.* at 4a, 13a. Murphy's extensive employment history exemplifies the lack of constraints that his high blood pressure places on his daily life. Prior to applying for a mechanic position with respondent United Parcel Service ("UPS") in 1994, he had worked in mechanic jobs for over 22 years. *Id.* at 13a. As his doctor testified, Murphy "functions normally doing everyday activity that an everyday person does." *Id.* at 4a.

Unlike Murphy's previous mechanic jobs, however, the UPS position involved some driving and so required medical certification pursuant to Department of Transportation ("DOT") regulations. Those regulations mandate that commercial vehicle drivers maintain blood pressure of 160/90 or lower. They exist to ensure that every driver on the road can operate vehicles safely. Pet. App. 3a & n.1, 14a-16a; 49 C.F.R. §§ 391.41(b)(6), 391.43. Murphy knew that he would have to pass DOT physical standards to secure the job with UPS. Pet. App. 13a. Yet Murphy has never been—and will never be—capable of reducing his blood pressure to the necessary level. *Id.* at 16a.

When Murphy took his pre-employment DOT physical in August 1994, his blood pressure was 186/124, well above the maximum permissible. Nonetheless, the testing clinic erroneously issued Murphy a DOT health card, which

allowed him to begin work at UPS. In September 1994, while reviewing employee medical records, the UPS medical supervisor discovered the clinic's mistake. Pet. App. 2a-3a, 16a. UPS had Murphy's blood pressure tested again, but it was still above the DOT standard. *Id.* at 17a. Because Murphy could not obtain DOT certification, UPS terminated him. *Id.* at 3a, 17a. A few weeks later, Murphy found a mechanic position, which did not require DOT certification, with another employer. *Id.* at 17a.

Murphy filed suit in the United States District Court for the District of Kansas, claiming that UPS violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, by terminating him due to his hypertension. Pet. App. 9a. The district court granted UPS's motion for summary judgment. The court held that in determining if Murphy had a "disability," his condition must be assessed in its medicated state. *Id.* at 23a-32a. Because the evidence showed that Murphy experienced no significant restrictions from his hypertension, the court decided that "a rational fact-finder would be unable to conclude that Murphy's high blood pressure constitutes a disability." *Id.* at 31a. The court also held that "UPS did not regard Murphy as disabled, only that he was not certifiable under DOT regulations." *Id.* at 32a.

The Tenth Circuit affirmed, holding that Murphy was not disabled and that UPS did not regard him as disabled. Pet. App. 2a, 5a. Examining the impact of Murphy's *medicated* hypertension, the court concluded that he was not substantially limited in any major life activity. His condition did not affect his daily life. In addition, UPS did not "regard Mr. Murphy as having an impairment that substantially limits a major life activity"; it terminated him because his blood pressure exceeded DOT requirements. *Id.* at 4a-5a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Americans with Disabilities Act sets out three ways in which to qualify as "disabled": (i) by having an actual disability, (ii) by having a "record of" disability, and (iii) by being "regarded as" disabled. 42 U.S.C. § 12102(2). Excluding mitigating measures from the evaluation of whether someone is "actually disabled" twists the first of these alternate definitions to create a new, unintended class of ADA beneficiaries: those who are not in fact disabled, but who could *create* a disability if they were to cease alleviating their health conditions with medications or assistive devices.

To include such hypothetically restricted persons within the reach of the ADA is to read out the statutory requirement that the "impairment * * * substantially limits" the individual. 42 U.S.C. § 12102(2)(A) (emphasis added). Under petitioner's approach, a plaintiff does not have to establish that he is currently severely limited in a major life activity, or even that he is limited at all; it is enough that his underlying condition, untreated, would have that effect. By honing in on the conditions themselves instead of the plaintiff's functional limitations, this interpretation of the ADA also eradicates the statute's emphasis on the "individual": the plaintiff is in effect replaced by his disorder.

Since the statute itself precludes omitting mitigating measures from the disability determination, the legislative history and EEOC interpretive guidelines cannot be invoked to assert otherwise. In any event, the congressional reports bolster the plain reading of the statutory text. And the EEOC guidelines have little value because they are internally contradictory and create an unsound distinction between internal and external compensating factors.

Besides nullifying the statutory text, the removal of mitigating measures from the analysis of "disability" unjustifiably extends ADA coverage to people with non-limiting, widely-shared impairments. This distorts the Act's legitimate anti-discrimination goals and disrupts the even-handed distribution of its benefits. Although plaintiffs with uncorrectable impairments must still demonstrate that they are substantially limited, those with correctable conditions can qualify for protection despite their lack of actual restrictions.

Finally, petitioner cannot resort to the "regarded as" prong in an attempt to show that he is disabled under the ADA. That definition of disability applies when an employer acts due to misperceptions about the plaintiff's abilities, not when the plaintiff fails to meet an objective and valid standard.

ARGUMENT

I. MITIGATING MEASURES MUST BE CONSIDERED IN DETERMINING IF AN INDIVIDUAL IS DISABLED UNDER THE AMERICANS WITH DISABILITIES ACT

A. To Give Meaning To The Statutory Phrase "Substantially Limits," Courts Must Incorporate Mitigating Measures Into The Assessment Of Disability

As this Court "has stated time and again," "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The first of the ADA's definitions of disability provides that a person is disabled if he has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A) (emphasis

added). The ordinary and natural meaning of these words is that this subsection covers only those individuals whose impairments actually place "substantial limitations" on the performance of life activities. But if the disability determination is conducted without regard for mitigating measures, impairments that have the potential to impose restrictions or may hypothetically do so are subsumed within the ADA. See *Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part); *Sutton v. United Air Lines*, 130 F.3d 893, 902 (10th Cir. 1997), cert. granted, No. 97-1943 (Jan. 8, 1999). Because that construction offends the plain language of the statute, it must be rejected.

By defining a disability as an impairment that "substantially limits" the individual, the ADA on its face is concerned with severe restrictions in functioning. 42 U.S.C. § 12102(2)(A). See *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 199 (4th Cir. 1997) (the "ordinary or natural meaning of 'substantially limits' requires that an impairment significantly restrict an individual's ability to perform a major life activity"); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) ("not every impairment that affect[s] an individual's major life activities is a substantially limiting impairment"). If mitigating measures are ignored, the effect is to pretend that such restrictions exist when, in fact, they do not. As the court below recognized, individuals who use medications or other compensating mechanisms to control their conditions so that they can "functio[n] normally," do not endure severe limitations in their daily lives. Pet. App. 4a. See *Sutton*, 130 F.3d at 902-903 (when wearing glasses, plaintiffs with poor vision could "go about all their normal daily activities" in the "same or similar" manner as the majority of the population and, therefore, were not disabled); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) (plaintiff who could "perform normal

daily activities" was not disabled). Thus, conferring benefits on that group of plaintiffs destroys the boundary delineated by the statute between those who suffer profound constraints from their conditions and those who are merely impaired. See *Dutcher v. Ingalls Shipbuilding, Inc.*, 53 F.3d 723, 726 (5th Cir. 1995) (a physical impairment, "standing alone," is not equivalent to a disability as contemplated by the ADA); *Kelly v. Drexel Univ.*, 94 F.3d 102, 108 (3d Cir. 1996) (same).

The facts of this case aptly illustrate how petitioner's approach eliminates the requirement that an impairment "substantially limit" an individual. With medication to reduce his high blood pressure, Murphy can do "everyday activity that an everyday person does." Pet. App. 4a. The medication is so effective that for over 22 years—and up to the present day—he has been able to work at various mechanic jobs for which he does not need DOT certification. *Id.* at 13a, 17a. Granting Murphy relief just because his unregulated blood pressure averages 250/160 (a condition he never experiences) would render meaningless all this evidence of his ample functional abilities. To say that *despite* his capacity to engage in usual activities and *despite* his full employment history, he is somehow "substantially limited" guts the Act of those words. See *Swain v. Hillsborough County Sch. Bd.*, 146 F.3d 855, 857 (11th Cir. 1998) (teacher who worked as an educator and administrator for 20 years was not substantially limited by her physical impairments); *Still*, 120 F.3d at 52 (numerous jobs plaintiff had held demonstrated that he was not legally disabled); *Roth*, 57 F.3d at 1455 (plaintiff's past work experience as a pharmacist, attorney, and university lecturer repudiated his claim that he was significantly restricted in seeing).

The ADA also directs courts to inquire into the "limits" that a condition imposes on the "major life activities of [the]

individual." 42 U.S.C. § 12102(2)(A) (emphasis added). This compels an analysis of whether an impairment produces significant disadvantages for the particular person who is seeking to invoke the protections of the Act. See, e.g., *Sutton*, 130 F.3d at 897 (the statutory phrase "with respect to the individual" signifies that there must be an individualized, case-by-case assessment of whether a given impairment amounts to a substantial limitation); *Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 963 (7th Cir. 1996) ("It is precisely because there are usually many person-specific considerations that are relevant to the issue of disability that we have held that the finding should be based on an individualized inquiry and is 'best suited to case-by-case determination'"). In order to undertake such an evaluation, it is necessary to fully account for all the circumstances of the person's specific situation, including the impact of any aids or medications upon his daily life.²

A rule that disability is determined without reference to mitigating measures would transform what should be an individualized appraisal of a plaintiff's true capabilities into generalizations about how the impairment in question typically affects people who are not taking medication or using assistive devices. See *Gilday*, 124 F.3d at 767 (Ken-

² This emphasis easily disposes of the Government's criticism that taking mitigating measures into account brings "a strange instability to the definition of disability" inasmuch as their effectiveness for, and use by, an individual may "vary * * * over time." In concentrating on the individual impact of an impairment, the ADA accepts that not everyone with a particular condition will qualify as "disabled" and that if the severity of a person's condition changes, his ADA status may as well. Thus, the "instability" that the Government is worried about already exists and is an integral feature of the statutory scheme. If Congress thought such results were intolerable, it would have defined "disability" differently.

ney, J., concurring in part and dissenting in part) (if we fail to consider mitigating measures, "we do not make an individualized comparison to the average person in the general population"). The plaintiff's condition would be looked at in the abstract, not in terms of the challenges it presents for him day to day. That impermissibly substitutes mere medical diagnoses for the ADA's focus on the plaintiff's own functional limitations.

If Congress had intended for disorders alone to constitute "disabilities," it could have said so in the statute. Instead, Congress chose a functional definition of disability, giving full recognition to the fact that "there are varying degrees of impairments as well as varied individuals who suffer from impairments." *Homeyer*, 91 F.3d at 962 (the ADA precludes a finding of disability based on "categories of impairments"); see also 136 Cong. Rec. 9072 (1990) ("The ADA includes a functional rather than a medical definition of disability"); *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 872 (2d Cir. 1998) ("the determination whether an impairment 'substantially limits' a major life activity is fact specific").

Seeking to circumvent the plain language of the ADA, the petitioner and his *amici* contend that the statute's structure warrants the exclusion of mitigating measures when deciding if a plaintiff is "disabled." The Government in particular stresses that mitigating measures should be examined after the initial judgment as to disability because that is the way the statute handles "reasonable accommodations." Otherwise, the Government submits, there is a "'disincentive to self-help'" in that individuals who utilize mitigating measures will not be accorded protection, while those who await reasonable accommodations will be (citing *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854 (1st Cir. 1998)).

This reasoning is flawed. First, the "reasonable accommodations" that employers must supply to their qualified, disabled employees do not include personal items, such as medications, eyeglasses, or hearing aids. H.R. Rep. No. 485, Pt. II, 101st Cong., 2d Sess., at 64 (1990); S. Rep. No. 116, 101st Cong., 1st Sess., at 33 (1989). Hence, Congress has already concluded that the onus is on employees in the first instance to help themselves. Second, it is highly improbable that individuals will forego allaying the effects of their conditions just to secure coverage under the ADA. Many individuals may have no choice but to invest in mitigating measures. Petitioner himself claims that without his medication he would have to be "hospitalized" and would "eventually die from [his] high blood pressure." Pet. 7. The suggestion that Murphy (or even those who would face less serious consequences) would risk his well-being or reduce his quality of life for the sake of potential benefits under the ADA is simply not plausible.

The Government's further argument that evaluating an impairment in its untreated state is the only way to effectuate the ADA's "reasonable accommodation" mandate is similarly unconvincing. The Government incorrectly posits that, absent such a rule, employers would not have to adjust the workplace for employees who request accommodations necessitated by their use of mitigating measures, stating that "[i]n many employment situations, giving the employee a brief break so that the employee could take * * * medication would be a reasonable accommodation." Clearly, in unusual situations the need to take corrective measures to alleviate a condition might itself interfere so greatly with normal life activities as to render an individual disabled and might require reasonable accommodation. But that does not mean that someone who simply has to take a pill periodically (or put on glasses or a hearing aid) is disabled. Taking account of mitigating measures recognizes the difference between

these individuals; it does not deprive truly disabled employees of required accommodations.

B. Legislative And Administrative Sources Do Not Undercut The Statutory Directive That Mitigating Measures Be Factored Into The Disability Determination

1. The legislative history does not support disregarding a plaintiff's use of medications or medical devices

Unambiguously, the ADA defines as disabled only those individuals who are in fact "substantially limited." The Act's words can be given effect only by incorporating mitigating measures into the disability determination. There is no need to "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994). "[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994).

Even if the statute were ambiguous, the legislative history does not justify disregarding mitigating measures. Petitioner and his *amici* rely heavily on the statement in both committee reports that, under the ADA's first prong, "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." H.R. Rep. No. 485, Pt. II, at 52; S. Rep. No. 116, at 23. It is wrong, however, to construe that statement as supporting the exclusion of mitigating measures.

"Reasonable accommodations" and "auxiliary aids" are terms of art. They are specifically defined in the statute as job-assistive devices furnished by employers, not employee-supplied mitigating measures. 42 U.S.C. § 12111(9) (exam-

ples of reasonable accommodations are “the provision of qualified readers or interpreters,” the “acquisition or modification of equipment or devices,” and other “similar” accommodations); 42 U.S.C. § 12102(1) (listing the same measures as “auxiliary aids”). Consistent with these definitions, the congressional reports themselves stress that “personal use items such as hearing aids or eyeglasses” do *not* fall within the definition of reasonable accommodations. H.R. No. 485, Pt. II, at 64; S. Rep. No. 116, at 33.

Consequently, the simple message of the congressional reports, which is amply supported by the statutory language, is that employer-provided job-assistive measures are not taken into account in determining whether a person is disabled. The passage in question says nothing at all to suggest that employee-provided measures that are not specifically job-related but that serve to mitigate the employee’s medical condition are irrelevant to determining disability.

Another passage of the Senate Report supports this conclusion. Explaining the purpose of the “regarded as” prong of the ADA, the Senate Report states:

Another important goal of the [regarded as] prong of the definition is to ensure that *persons with medical conditions that are under control, and that therefore do not currently limit major life activities*, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified.

S. Rep. No. 116, at 24 (emphasis added). This passage clearly conveys that individuals who can adequately compensate for their impairments are not disabled under the ADA’s first prong, 42 U.S.C. § 12102(2)(A), and must turn to the

“regarded as” prong if they wish to qualify as disabled. And it can only mean that gauging whether someone has a disability under subsection (A) requires looking at the individual’s level of functioning with the benefit of ameliorative or corrective measures.³ Consequently, taken as a whole, the legislative history advances rather than detracts from the position that mitigating measures are an indispensable part of the disability determination.⁴

³ The Government (at footnote 2) contends that the Senate Report cannot be interpreted as precluding someone with a controlled condition from falling within the actual disability prong of the ADA because an individual may be “disabled” under both that prong *and* the “regarded as” prong. That explanation is unavailing: the Senate Report expressly says that the *very reason* a person with a mitigated impairment must resort to the “regarded as” prong is that his impairment is controlled and, *as a result*, he is “not currently limit[ed] [in] major life activities.” S. Rep. No. 116, at 24. Moreover, if people with controlled conditions could fit under the actual disability prong, the “regarded as” prong would not be needed to serve the “important goal” (*id.*) of protecting their interests.

⁴ The House Report at one point suggests that individuals who use hearing aids or take medication are considered substantially limited “even if the effects of the impairment are controlled.” H.R. Rep. No. 485, Pt. II, at 52. But these examples are at odds with the House Report’s own description of reasonable accommodations as job-related aids, with the Senate Report and, most important, with the plain language of the statute itself. They should therefore be disregarded. At best, the House Report adds confusion, not clarity, to the issue of mitigating measures.

2. The EEOC's guidelines warrant no deference because they conflict with the statutory text and are internally inconsistent

The EEOC addresses mitigating measures only in interpretive guidelines issued as an appendix to the ADA regulations. The guidelines state that mitigating measures should be omitted from the analysis of whether a plaintiff is "disabled." 29 C.F.R. pt. 1630.2(j) app. However, this "guidance" should be rejected because it conflicts with the plain meaning of the ADA, as well as other portions of the appendix, and establishes a faulty distinction between internal and external mitigating measures.

It is unnecessary to decide what weight should be accorded to the EEOC guidelines, because they do not survive even the highest level of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).⁵ The guidelines' statement that "whether an individual is substantially limited in a major life activity must be made * * * without regard to mitigating measures, such as medicines, or assistive or prosthetic devices," we have already shown, directly contravenes the ADA's mandate that

⁵ Nevertheless, the EEOC guidelines ought not to carry the same force of law as the regulations themselves because they are purely interpretive rules. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretive guidelines are not entitled to the same deference as regulations); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) ("a court is not required to give effect to an interpretative regulation"). Most circuit courts confronting this issue have agreed. See *Arnold*, 136 F.3d at 864; *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Washington v. HCA Health Servs., Inc.*, 152 F.3d 464, 469-470 (5th Cir. 1998); *Gilday*, 124 F.3d at 766 (Kennedy, J., concurring in part and dissenting in part); *id.* at 763 n.2 (Moore, J., minority opinion); *Sutton*, 130 F.3d at 899 n.3.

an individual experience "substantial limitations" from a medical condition. Since "[n]o deference is due to agency interpretations at odds with the plain language of the statute itself," the guidelines must be rejected. *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989); see also *Gilday*, 124 F.3d at 767 (Kennedy, J. and Guy, J., concurring in part and dissenting in part) (declining to defer to EEOC guidance because it "conflicts with the text of the ADA" and thus is not a "'permissible construction of the statute'"); *Sutton*, 130 F.3d at 901 n.8 (listing numerous courts that have refused to defer to the EEOC guidelines because they conflict with the statute); *Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent").

Furthermore, the EEOC guidelines are self-contradictory. To begin with, like the Senate Report, the guidelines indicate that someone with a "controlled [condition] that is not substantially limiting" would fit within the definition of "regarded as" disabled—assuming all other elements of the claim were met. 29 C.F.R. pt. 1630.2(l) app. The district court clearly explained the "tension" this statement produces within the EEOC's guidance (Pet. App. 26a):

This section appears to be at odds with interpretative guidelines found in § 1630.2(j). Under § 1630.2(j) of the EEOC's interpretive guidelines, a person's unmedicated high blood pressure would constitute a disability. Yet, the interpretative guidelines in § 1630.2(l) implicitly suggest that a person who has controlled his blood pressure by medication does not have a disability; if this were not so, why would a person suffering from high blood [pressure] ever have to look to the "regarded as" section of the ADA to prove the existence of a disability?

In addition, part 1630.2(j) (app.) recognizes that "whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." Inconsistently, the EEOC would bar courts from evaluating the effects of mitigating measures, even though it is impossible to assess the true impact of an impairment on an individualized basis without taking such measures into account.

The value of the EEOC guidelines is further reduced because they are, at least in one respect, irrational. All of the guidelines' examples of "mitigating measures" are external compensations—medicines and medical devices. 29 C.F.R. pt. 1630.2(j) app. This suggests that internal, or personal, adaptions *should* be factored into the disability determination. See *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (plaintiff was not "substantially limited" because she had "trained herself" to do "'all of the basic things' she needs to do in life with her [injured] arm"); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1449, 1455 (7th Cir. 1995) (plaintiff was not disabled where his visual condition was not completely correctable with lenses, but he had "'adapted well to daily activities'").

We agree that internal adjustments must be taken into account when ascertaining whether a person is disabled. See Brief *Amicus Curiae* of American Trucking Associations, *et al.*, filed in *Albertsons, Inc. v. Kirkingburg*, No. 98-591. But there is no defensible reason for drawing a line between internal and external mitigating measures. Since internal and external corrections similarly affect the extent to which a limitation interferes with life activities, both should be considered in the "disability" decision. Murphy is not "substantially limited" because he manages his hypertension with medication. Another person may not have a disabling

impairment because he can lower his blood pressure through relaxation techniques. Likewise, one person may wear corrective lenses to improve his vision, whereas another may have developed subconscious mechanisms that alleviate the effects of his poor eyesight, so that neither is restricted in carrying out everyday tasks. In every instance, the end result is identical—the person is not substantially limited in major life activities. By creating this untenable distinction between internal and external compensating measures, the EEOC guidelines arbitrarily dole out protection under the ADA.

C. Ignoring Mitigating Measures Expands The ADA Well Beyond Its Intended Scope By Affording Protection To A Widespread Group Of Individuals With Non-Limiting Impairments

The approach to determining disability urged by petitioner and his *amici* has far-reaching practical consequences. It would expand the ADA's definition of disability to include individuals who, because of their use of medication or other corrective measures, do not currently experience substantial limitations from their impairments. Individuals who have non-limiting or mild impairments could then take advantage of the ADA's remedial provisions, despite Congress's express directive to the contrary. Congress could not have been more clear, both in the statutory language it chose and in the committee reports, that "minor, trivial impairment[s]" are *not* within the scope of the Act. S. Rep. No. 116, at 23; H.R. Rep. No. 485, at 52.

Courts have frequently observed that "[i]t would debase [the] high purpose [of the ADA] if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared." *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997); see also *Patrick v. Southern Co. Servs.*, 910 F. Supp. 566, 567 (N.D.

Ala.) ("Much of the criticism of the ADA in practice has come from the truly disabled who recognize that * * * attempted stretches [of the definition of disability] can cause negative reaction to the Act and perhaps undermine its true purposes"), aff'd, 103 F.3d 149 (11th Cir. 1996). But if all it takes to be covered under the ADA is a correctable condition that, unmitigated, would interfere with everyday tasks, a huge segment of the population would unjustifiably be swept under the umbrella of the statute.

One in four adult Americans has high blood pressure, which is "easily detected and usually controllable." American Heart Association, *1999 Heart and Stroke Statistical Update—High Blood Pressure* (visited Mar. 12, 1999, at <http://www.amhrt.org/statistics>). Approximately half of those persons are on medication, and a quarter have their hypertension completely under control. *Ibid.* That results in between 15 to 25 million additional people who may be "disabled" due to their underlying (not their actual) conditions under petitioner's theory of ADA disability. *Ibid.*

Other common problems that are likewise easily remedied are visual deficiencies and hearing impairments. In the United States, "more than 100 million people need corrective lenses to see properly." National Advisory Health Council, *Vision Research—A National Plan: 1999-2003*, at 7, U.S. Dep't of Health and Human Servs., NIH Pub. No. 98-4120. And more than 28 million people have hearing loss, 15% of whom use hearing aids. National Institutes of Health Consensus Statement Online, *Noise and Hearing Loss* (Jan. 22-24, 1990) (visited Mar. 12 1999, at <http://odp.od.nih.gov/consensus/cons/hearing.htm>); National Center For Health Statistics, *Number of Persons Using Assistive Technology Devices by Age of Person and Type of Device: United States, 1994*, Centers for Disease Control, Table 1

(visited Mar. 16, 1999, at http://www.cdc.gov/nchswww/about/major/nhis_dis/ad292tb1.htm).

Examining these individuals without their medication or assistive devices would create a vast new class of ADA beneficiaries who, in fact, should readily be disqualified from protection because of the absence of constraints on their daily lives. Their prevalent, correctable conditions allow them to function within "the economic mainstream of our society" (S. Rep. No. 116, at 10; H.R. Rep. No. 485, Pt. II, at 34); they are not part of a "discrete and insular minority who have been faced with restrictions and limitations," 42 U.S.C. § 12101(a)(7).

Ignoring mitigating measures in determining disability creates unfairness instead of parity in the provision of benefits. It subjects those with correctable impairments to a "different standard" than persons who have no way to alleviate their conditions. *Gilday*, 124 F.3d at 767 (Kennedy, J., concurring in part and dissenting in part). It is only the latter group who must demonstrate that they are actually severely restricted in their daily lives in order to come within the statute's protections, while individuals who are less impaired due to their use of medication or other aids—but whose underlying conditions are more severe—are covered by the statute. Such results do obvious damage to the even-handed treatment of plaintiffs under the ADA.

II. AN EMPLOYEE CANNOT QUALIFY AS DISABLED UNDER THE “REGARDED AS” PRONG MERELY BECAUSE HE FAILED TO SATISFY AN OBJECTIVE REQUIREMENT OF A SPECIFIC JOB

The Tenth Circuit correctly held that UPS did not regard Murphy as disabled so as to bring him within the ADA’s third definition of “disability,” because UPS did not have “an unsubstantiated fear that he would suffer a heart attack or stroke.” Pet. App. 5a (quoting 29 C.F.R. pt. 1630.2(l) app.). “Rather, UPS terminated Mr. Murphy because his blood pressure exceeded the DOT’s requirements for drivers of commercial vehicles.” *Ibid.* Thus, UPS did not act based on “reflexive reactions” to a perceived handicap, but on a “reasoned and medically sound judgment” expressed by the DOT. *School Bd. v. Arline*, 480 U.S. 273, 285 (1987) (discussing “regarded as” prong of Rehabilitation Act, from which ADA provision was drawn).

As the Tenth Circuit recognized, the focus of the “regarded as” prong is “not on [the plaintiff] and his actual abilities, but rather on the reactions and perceptions of the persons interacting or working with him.” *Kelly v. Drexel Univ.*, 94 F.3d 102, 108-109 (3d Cir. 1996). See also H.R. Rep. No. 485, Pt. III, 101st Cong., 2d Sess. 30 (1990) (“The perception of the covered entity is a key element of [the ‘regarded as’] test”); *Deas v. River West, L.P.*, 152 F.3d 471, 476 n.9 (5th Cir. 1998) (“Under the ‘regarded as’ prong, the disability status of the plaintiff turns not on the plaintiff’s physical condition, but rather on how the plaintiff was perceived and treated by those individuals alleged to have taken discriminatory action”); *Runnebaum v. Nationsbank of Md., N.A.*, 123 F.3d 156, 172 (4th Cir. 1997) (same). The plaintiff must show that he is perceived as having an impairment that substantially limits a major life

activity. 42 U.S.C. § 12102(2)(C); see, e.g., *Dutcher*, 53 F.3d at 727; *Ryan*, 135 F.3d at 872.

The Government and petitioner insist that Murphy’s inability to obtain DOT certification is sufficient to establish that UPS regarded him as disabled in the major life activity of working. That argument is meritless. It ignores the fact that it is the employer’s subjective intent that is important under the “regarded as” prong. *Francis v. City of Meriden*, 129 F.3d 281, 284 (2d Cir. 1997) (liability under the “regarded as” prong “turns on the employer’s perception of the employee, a question of intent, not whether the employee has a disability”); *Deas*, 152 F.3d at 480 (“the plaintiff bears the burden of making a prima facie showing that the impairment, as the defendant perceived it, was substantially limiting”). The termination of an employee for his failure to satisfy the objective requirements of a specific job simply does not give rise to an inference that the employer had a forbidden “intent.” See *Forrisi v. Bowen*, 794 F.2d 931, 934-935 (4th Cir. 1986) (employee whose acrophobia prevented him from doing necessary climbing for job was not “regarded as” disabled); *Dutcher*, 53 F.3d at 728 (plaintiff denied welding position because she could not climb with injured arm was not “regarded as” disabled). Moreover, where, as here, the employment decision is grounded on an independent, government-supplied standard, there is no employer input *at all* with respect to the underlying basis for disqualification. The contention that recovery should be allowed under these circumstances is, therefore, all the more unreasonable.⁶

⁶ The Government objects that an employer could always escape liability by claiming that it perceived the employee as unable to satisfy an element of the job. But an employer cannot prevail in an ADA case by setting forth a rationale for its decisions that is mere pretext. And if the employer does act due to its misperception that

Congress's stated purpose in adopting the "regarded as" prong was to combat "society's accumulated myths and fears about disability and diseases." H.R. Rep. No. 485, Pt. II, at 53; S. Rep. No. 116, at 24 (each citing *Arline*, 480 U.S. at 284); see also 29 C.F.R. pt. 1630(l) app. (reciting legislative history). In view of this aim, courts have recognized that the employer's opinion about the restrictions imposed by the employee's purported impairment must be inaccurate. See, e.g., *Francis*, 129 F.3d at 286-87 ("The [ADA] reach[es] discrimination where an individual does not have a physical impairment but is erroneously perceived as having one," and "address[es] the problem of the employer who, based on nothing more than superstition or irrational fear, regards an individual as having a substantially limiting impairment when the individual is either capable of working or has no impairment at all"); *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995) (dismissing "regarded as" claim as there was no evidence that employer's perception was "based upon speculation, stereotype, or myth"). The Government disputes the need for such a showing. But the requirement of some kind of *misperception* on the employer's part follows from the regulations' explication of what it means to be "regarded as" disabled.

The regulations say that an individual fits under the "regarded as" prong if he (i) has an impairment that is not substantially limiting but is treated as having such an impairment, (ii) has an impairment that is substantially limiting only as a result of the attitudes of others, or (iii) does not have an impairment but is treated as having a

an impairment barred an employee from a large class of jobs, it may be held responsible. See *Cook v. Rhode Island*, 10 F.3d 17, 26 (1st Cir. 1993) (affirming judgment for plaintiff where defendant believed her obesity foreclosed her from a broad range of employment).

substantially limiting impairment. 29 C.F.R. § 1630.2(l). The common thread through these three criteria is that the employer must mistake the reality of the plaintiff's situation. UPS's accurate application of legally mandated health standards does not meet that requirement; such objective decisions are simply not the "evils" the "regarded as" test seeks to rectify. See *Wooten*, 58 F.3d at 385-386 (plaintiff's termination was due to physical restrictions imposed by his doctor, not an erroneous perception, and so there was no indication that defendant regarded him as having a substantially limiting impairment).

UPS's termination of Murphy was also proper because "[a]n employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish *per se* that the employer regards the employee as having a substantial limitation on his ability to work in general."⁷ *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993). Instead, the employer must view "the employee's impairment [as] foreclos[ing] generally the type of employment involved." *Forrisi*, 794 F.2d at 935; see also *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) ("an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the Act").

The EEOC regulations reflect this same analysis:

The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as

⁷ For this reason, even if it is accurate to characterize the DOT's guidelines on blood pressure above 160/90 as permissive rather than mandatory—which would render UPS's termination of Murphy discretionary—Murphy still has not made his case.

compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). Murphy's claim falls on the wrong side of these standards. His blood pressure was too high for him to be able to do the driving that was an integral part of the UPS position and, thus, he was fired because could not perform an essential function of *that particular mechanic job*. See, e.g., *Chandler*, 2 F.3d at 1392-1393 (plaintiffs could not prove that they were "regarded as" disabled where "[t]he only relevant limitation perceived by the City regarding the plaintiffs' ability to work concerned their abilities to drive City vehicles on the job without risk to themselves or others"); *Deas*, 152 F.3d at 481-482 (defendant did not regard plaintiff who suffered seizures as "disabled" in working, but only as "substantially limited as to * * * a few, highly specialized jobs that required relatively high levels of vigilance or uninterrupted awareness"). Murphy was, and is, perfectly capable of performing other mechanic jobs for which he does not have to pass DOT tests.⁸

A ruling that UPS regarded Murphy as disabled would, therefore, upset the uniform consensus that the mere incapacity to meet a certain job's physical requirements does not render an employee "disabled." Absent such a rule, *all*

⁸ That Murphy has continually worked as a mechanic for more than two decades negates the Government's argument that DOT certification should be used as a proxy for a "class of jobs." Murphy's elevated blood pressure clearly leaves many employment options in his field open to him, and he has taken advantage of them.

employees who were fired or denied a specific position for that reason could automatically qualify for coverage under the ADA. That would again subvert the Act's purpose to protect only those with substantially limiting conditions. In addition, employers would be stripped of their ability to rely in good faith on the results of post-offer, pre-employment medical exams. See 29 C.F.R. § 1630.14(b) (employers may condition offers upon the outcome of medical tests or inquiries, provided each entering employee for that job category is subjected to the same examination). That could have disastrous consequences in cases where the job, whether it be commercial truck driver, airline pilot, or police officer, implicates public safety.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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